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In The

Supreme Court of the United States

October Term, 1992

REX A. SHARP, KERRY MCQUEEN, JAMES H. MORAIN, and DANIEL H. DIEPENBROCK, as individuals, NEUBAUER, SHARP, MCQUEEN, DREILING & MORAIN, P.A., as a firm, and ALL OTHER LAWYERS AS A CLASS REQUIRED BY THE STATE OF KANSAS TO REPRESENT KANSAS INDIGENT CRIMINAL DEFENDANTS

Petitioners,

v.

THE STATE OF KANSAS,

Respondent.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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QUESTION PRESENTED FOR REVIEW

I. DID THE KANSAS SUPREME COURT ERR IN AFFIRMING THE SEWARD COUNTY DISTRICT COURT ON THE GROUNDS THAT ITS DECISION IN *STATE ex. rel. STEPHAN v. SMITH,* 242 Kan. 336, 747 P.2d 816 (1987) WAS PROSPECTIVE AND APPLIES ONLY TO SERVICES RENDERED BY ATTORNEYS APPOINTED PURSUANT TO THE KANSAS INDIGENT DEFENSE SERVICES ACT, K.S.A. 22-4501, *et seq.* AFTER JULY 1, 1988?

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REX A. SHARP, KERRY McQUEEN, JAMES H. DIEPENBROCK, and JAMES H. MORAIN, as individuals, NEUBAUER, SHARP, McQUEEN, DREILING & MORAIN, P.A., as a firm, and ALL OTHER LAWYERS AS A CLASS REQUIRED BY THE STATE OF KANSAS TO REPRESENT KANSAS INDIGENT CRIMINAL DEFENDANTS,

Petitioners,

v.

THE STATE OF KANSAS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

STATEMENT OF THE CASE

This appeal is from the third of petitioners' suits against the State of Kansas. The latest petition for a writ of certiorari is the third filed in these cases.

Through these actions, petitioners have sought monetary damages for injuries allegedly sustained as result of the Indigent Defense Services Act, K.S.A. 22-4501 *et seq.* (Weeks) as amended, its statutory precedent, and the rules and regulations promulgated pursuant to the Act. Petitioners are attorneys at law, as well as a professional association of attorneys who were appointed by state district courts to represent indigent criminal defendants. They were compensated pursuant to the Act.

The origins of this case are found in the December 15, 1987 opinion of the Kansas Supreme Court in the case of *State ex rel. Stephan v. Smith,* 242 Kan. 336, 747 P.2d 816 (1987). In that case, Chief Justice Miller, writing for a unanimous Kansas court, reversed century old precedent and found that attorneys appointed to defend indigent criminal defendants do have a right to compensation. It was truly a landmark decision for the state. It recognized attorney services as property protected by the Constitution for the first time in Kansas. Petitioners had absolutely nothing to do with this change in the law.

The Kansas Legislature meets from January to April each year. The state's fiscal year begins on July 1, and ends on June 30 of each year. The *Smith* decision did allow the state legislature the time needed to double the indigent defense system's budget, create a voluntary system of court appointments, and expand the public defender system.

On January 4, 1988, three weeks after the *Smith* decision, petitioners' filed a Class Action Complaint and Mandamus Proceeding against the State of Kansas in the United States District Court for the District of Kansas. This action was subsequently dismissed without prejudice on the basis of 11th Amendment Immunity. The dismissal was upheld by the Tenth Circuit Court of Appeals. Certiorari was denied by this Court. *Sharp, et al. v. State of Kansas,* No. 88-1001-K (D.Kan. March 16, 1988), *aff'd.* No. 88-1553, (10th Cir. May 7, 1990), *cert. denied,* 112 L.Ed.2d 206 (1990), hereinafter referred to as *Sharp-Fed.*

On March 16, 1988, petitioners filed a second Class Action Petition against the State of Kansas in the State District Court of Seward County, Kansas. Summary judgment was entered in favor of Kansas. The primary basis of the state's argument was that the petitioners were suing the wrong defendant under numerous theories of law

which either did not exist, or did not apply to the State of Kansas.

On December 8, 1989, the Kansas Supreme Court affirmed the district court's judgment. Chief Justice Miller, again writing for a unanimous court, found that petitioners had not stated a cause of action in the district court. This Court again refused to hear the petitioner's appeal. *Sharp v. State,* 245 Kan. 749, 783 P.2d 343, *cert. denied,* 112 L.Ed.2d 45 (1990), hereinafter referred to as *Sharp I.*

On January 18, 1990, petitioners filed a third Class Action Petition against the State of Kansas, in the District Court of Seward County, Kansas. Petitioners, in this action, sought monetary damages under a Fifth Amendment inverse condemnation theory, as well as a state claim of unjust enrichment. The State's motion to dismiss was granted on the grounds of res judicata and failure of the petition to state a claim upon which relief could be granted.

On February 28, 1992, the Kansas Supreme Court affirmed the district court's judgment. Chief Justice Holmes writing for a unanimous court found that the case of *Smith, supra,* which is the foundation of petitioners' case, was intended to be applied prospectively and did not support petitioners' claims. *Sharp v. State,* 250 Kan. 408, 827 P.2d 12, *reh. denied,* ____ Kan. ____ (1992), hereinafter referred to as *Sharp II.*

On July 20, 1992, petitioners filed their third petition for writ of certiorari. Respondent received its copy on July 22, 1992.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE DECISION OF THE KANSAS SUPREME COURT DID NOT CONFLICT WITH ANY OTHER STATE COURT OF LAST RESORT, ANY UNITED STATES COURT OF APPEALS OR THE UNITED STATES SUPREME COURT.

A. THE KANSAS SUPREME COURT DID NOT ERR IN AFFIRMING THE SEWARD COUNTY DISTRICT COURT ON THE GROUNDS THAT THE DECISION IN *STATE, ex rel. STEPHAN v. SMITH,* 242 Kan. 336, 747 P.2d 816 (1987), WAS PROSPECTIVE AND APPLIES ONLY TO SERVICES RENDERED BY ATTORNEYS APPOINTED PURSUANT TO THE INDIGENT DEFENSE SERVICES ACT, K.S.A. 22-4501, *et seq.* AFTER JULY 1, 1988.

The citizens of the State of Kansas have always enjoyed the right to be represented by legal counsel in criminal proceedings. U.S. Const. Amend. VI; Kan. Const. Bill of Rights, § 10, *State v. Verry,* 36 Kan. 416, 420, 13 P. 838 (1887). The right of counsel under the federal Constitution has evolved into a requirement that indigent defendants must be provided legal counsel at state expense. *Argersigner v. Hamlin,* 407 U.S. 25, 32 L.Ed.2d 530, 92 S.Ct. 2006 (1972); *Gideon v. Winwright,* 372 U.S. 335, 9 L.Ed.2d 799, 83 S.Ct. 792 (1963); *Powell v. Alabama,* 287 U.S. 45, 77 L.Ed. 158, 53 S.Ct. 55 (1932). The United States Supreme Court, while mandating legal assistance for indigent defendants, has never told the states how such services must be provided, leaving such matters to the states. Drecksel, *The Crisis in Indigent Criminal Defense,* 44 Ark.L.Rev. 363, 369-70.

From the early days of statehood until July 1, 1988, attorneys in Kansas were under a legal obligation to pro-

vide counsel to indigent criminal defendants when so ordered by the court. *State, ex rel. Stephan v. Smith,* 242 Kan. 336, 360-61, 747 P.2d 816 (1987); *Case v. Board of County Commissioners,* 4 Kan. 511, 513-14 (1868). During that time period, the Kansas courts followed the then majority rule and held that the attorney so ordered to represent an indigent did not have a constitutional right to compensation. *Smith,* 242 Kan. at 368-69; *Clark v. Ivy,* 240 Kan. 195, 202, 727 P.2d 493 (1986); *State v. Keener,* 224 Kan. 100, 102, 577 P.2d 1182 (1978); *United States v. Dillion,* 346 F.2d 633, 635 (9th Cir. 1965). With the *Smith* decision, the Kansas Supreme Court found that the traditional duty of the attorney to defend the indigent could no longer be enforced by traditional methods. The court ordered changes were to be made to the system by the deadline selected by the court. *Sharp v. State,* 245 Kan. 749, 754-55, 783 P.2d 343 (1989).

This litigation is petitioners' third attempt at money damages for injuries which allegedly resulted from their pre-*Smith* indigent defendant appointments. This latest petition is a challenge to the Kansas Supreme Court's use of Kansas law in holding that the *Smith* decision is to be applied prospectively. It is not the Kansas Supreme Court which is in err, it is the petitioners.

The United States Supreme Court has never held that the United States Constitution requires that attorneys who represent state indigent criminal defendants be fully compensated for their services. The foundation of petitioners' argument is the case of *James B. Beam Distilling Co. v. Georgia,* ____ U.S. ____, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991). That narrow opinion (see 111 S.Ct. at 2448) deals only with application of precedent of the *United States Supreme Court* All of the cases relied upon by petitioners are based upon the application of United States Supreme Court precedent.

The fact that that Kansas Supreme Court relied, in part, on the United States Constitution in *Smith,* does not

magically transform their decision into federal precedent which can be applied only retrospectively. As Justice Cardozo held,

> the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say the decisions of its highest court, though later overruled, are law none the less for intermediate transactions. *Great Northern Railway v. Sunburst Co.*, 287 U.S. 358, 364, 53 S.Ct. 145, 148, 77 L.Ed. 360 (1932).

A most recent example of this philosophy is found in the case of *Robinson v. Ponte*, 933 F.2d 101 (1st Cir. 1991). In this case, the circuit court refused to compel the retrospective application of a Massachusetts Supreme Court decision in a criminal case, even though said decision was based on the state court's interpretation of the United States Constitution.

As stated by the *Robinson* court:

> Therefore, that federal constitutional principles underlay the new rule of state law announced by *Henson*, does not convert the SJC's decision not to apply that rule retroactively on collateral review into a matter of federal due process concern. *See also Hicks v. Callahan*, 859 F.2d 1054, 1057-58 (1st Cir. 1988) (where state court declines to apply retroactively, on collateral review, its new rule that, where an underlying felony is unarmed robbery, the felony murder rule applies only if the jury finds that the defendant consciously disregarded risk to human life, there is no valid federal constitutional reason to do so), *cert. denied*, 489 U.S. 1069, 109 S.Ct. 1349, 103 L.Ed.2d 817 (1989); *La Rue v. McCarthy*, 833 F.2d 140, 143 (9th Cir. 1987) (there is no federal due process violation when a state court declines to apply retroactively on collateral review a decision holding that a person cannot be convicted of felony murder when the underlying offense is child abuse), *cert. denied*, 485 U.S. 1012, 108 S.Ct. 1482, 99 L.Ed.2d 710 (1988); *Bowen v. Foltz*, 763 F.2d 191, 193-94 (6th Cir. 1985) (state court's decision to decline to apply retroactively on collateral relief new rule requiring that the issue of malice, henceforth, must always be sub-

> mitted to the jury does not raise a federal question) *Robinson,* 933 F.2d at 104.

In criminal law, the decisions of the United States Supreme Court are completely retroactive. *Griffin v. Kentucky,* 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). Even under *Beam* some United States Supreme Court civil law decisions may be applied prospective. 111 S.Ct. at 2446. In light of *Great Northern Railway, supra,* as applied in criminal cases, there is little doubt that the United States Supreme Court should continue to abide by the principle of federalism which allow state courts to apply their own procedures and precedent in the manner that such state court believes is appropriate even when considering questions of federal law, e.g. *Asarco, Inc. v. Kadish,* 490 U.S. 605, 617, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989).

In addition to and in support of the above, defendant also suggests that petitioners' arguments ignore the special relationship between the Kansas Supreme Court and the attorneys which it licenses. The United States Supreme Court has often deferred to their state counterparts on the regulation and discipline of attorneys. An example of such difference is the Court's refusal to grant certiorari in the case of *Sharp v. State,* 245 Kan. 749, 783 P.2d 343 (1989) *cert. denied,* 112 L.Ed.2d 45 (1990). (*Sharp I.*)

This respect for the state judiciary in matters regarding the bar is summarized in *Hoover v. Ronwin,* 466 U.S. 558, 569 n. 18, 80 L.Ed.2d 590, 104 S.Ct. 1989 (1984), in which the Court held:

> Rowin does not dispute that regulation of the bar is a sovereign function of the Arizona Supreme Court. In *Bates State Bar of Arizona,* 433 U.S. 350, 361, 53 L.Ed.2d 810, 97 S.Ct. 2691 (1977), the Court noted that "the bar is at the core of the State's power to protect the public." Likewise, in *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 792, 44 L.Ed.2d 572, 95 S.Ct. 2004 (1975) the Court stated: "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function

> of administering justice, and have historically been 'officers of the courts.' " See also *In re Griffiths*, 413 U.S. 717, 722-723, 37 L.Ed.2d 910, 93 S.Ct. 2851 (1973). Few other professions are as close to "the core of the State's power to protect the public." Nor is any trade or other profession as "essential to the primary governmental function of administering justice."

There is no precedent compelling the Court to require monetary damages be made available to the petitioners. Petitioners' reliance on liquor taxes precedent notwithstanding Justice Miller's opinion in *Sharp I* was correct. See *Sharp I*, 245 Kan. 755. The Kansas Supreme Court's regulation of attorney conduct is recognized in law. The Kansas Supreme Court's reliance on the *Smith* and *Sharp I* cases is well placed.

The *Smith* decision did break new legal ground. The specific overruling of the century old precedent contained in *Case, supra.* Given the facts that courts still rely on the *Dillion, supra* precedent which held that no compensation is constitutionally due, arguments that the state should have known that the old system was unconstitutional are without merit. See *Walters v. Kemp*, 845 F.2d 260, 263 (11th Cir. 1988); *State, ex rel. Dressier v. Circuit Court*, 472 N.W.2d 532, 538-39 (Wis.App. 1991).

The *Smith* decision did bring about rapid and beneficial change. As stated in oral arguments in *Sharp I*, the budget for indigent defense services nearly doubled as a direct result of the *Smith* decision. By the date specified in the *Smith* decision, an original action brought by the state in response to Judge Smith's order in which the named petitioners had no part, a new system of indigent defense services was enacted and funded by the legislature. The purposes of justice was served. *Sharp I*, 245 Kan. 754-55.

CONCLUSION

The Kansas Supreme Court did not err in its opinion of February 28, 1992. Its reliance on Kansas law is not in conflict with any decision of the United States Supreme Court. This case should be concluded. The petition should be denied.

Respectfully submitted,

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